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ABSTRACT

This pamphlet provides general information concerning the application of the Fair Labor Standards Act (FLSA) to employees of preschool centers. The contents include discussion of the purview of the Act regarding preschools; monetary requirements such as minimum wages and employee facilities; provisions for equal pay, overtime pay, work hours, exemptions, child labor, records, and enforcement; the Age Discrimination in Employment Act, and the Federal Wage Garnishment Law. The FLSA, which is administered by the U.S. Department of Labor's Wage and Hour Division, was amended in 1972 to cover all activities performed in connection with the operation of a preschool (whether public or private and whether operated for profit or not for profit) regardless of the annual dollar volume of the institution, provided there are in the enterprise employees engaged in commerce or in the production of goods for commerce. (Author/SS)

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Preschools Under the Fair Labor Standards Act

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NOTE

The Fair Labor Standards Act does not require vacation or severance pay, or a discharge notice; nor does it set any limit on the number of hours of work for persons 16 years of age and over. It does not require an employer to give employees the day off on holidays. If the employee does work on a holiday, time and one-half, or any other premium holiday rate is not required. Under the Act holidays, like Saturdays and Sundays, are treated like any other day. Whether time off is granted or premium rates paid depends on the employment agreement.

This publication is for general information and is not to be considered in the same light as official statements of position contained in Interpretative Bulletins and other such releases formally adopted and published in the Federal Register.

U. S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division
Washington, D. C. 20210

PRESCHOOLS UNDER THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act contains minimum wage, equal pay, overtime pay, recordkeeping requirements, and child labor standards. This pamphlet provides general information concerning the application of this Act to employees of preschool centers.

The Act is administered by the U. S. Department of Labor's Wage and Hour Division. If you have specific questions about the statutory requirements, consult the nearest office of the Division for answers to your questions. Offices are listed in the telephone directory under Department of Labor in the U. S. Government listing.

GENERAL STATEMENT

The Education Amendments of 1972 (amending the Higher Education Act of 1965), amended the Fair Labor Standards Act and extended enterprise coverage to all activities performed in connection with the operation of a preschool (whether public or private or whether operated for profit or not for profit) regardless of the annual dollar volume of the institution, provided there are in the enterprise employees engaged in commerce or in the production of goods for commerce, including employees who handle, sell or otherwise work on goods which have been moved in or produced for such commerce.

This condition for coverage under the Act is met if the enterprise has two or more employees whose duties regularly include work related to ordering or receiving materials or supplies used in its operations such as food, books, toys, etc., from other States, or handling, selling, or otherwise working on such goods which have originated outside the State. (Note: Any establishment which has as its only regular employees members of the owner's immediate family is not considered an enterprise under the Act.)

A preschool is any enterprise as discussed above which provides for the care and protection of infants or preschool children outside their own homes during any portion of a 24-hour day. The term "preschool" includes any establishment or institution which accepts for enrollment children of preschool age for purposes of providing custodial, educational, or developmental services designed to prepare the children for school in the years before they enter the elementary school grades.

This includes day care centers, nursery schools, kindergartens, head start programs and any similar facility primarily engaged in the care and protection of preschool children.

Employees of preschools employed at central locations where the operations of the centers are administered or serviced and whose work involves duties in connection with the operation of the centers are within the coverage of the Act. For example, coverage extends to clerical workers performing duties in connection with the purchasing or distribution of supplies or equipment for the centers, and to mechanics servicing vehicles or other equipment used in the centers' operations.

Volunteer services: Individuals who volunteer their services, usually on a part-time basis, to a preschool not as employees or in contemplation of pay are not considered employees within the meaning of the Act. For example, mothers may assist in a preschool as a public duty to maintain effective services for their children, or fathers may drive a bus to take a group of children on a trip without creating an employer-employee relationship. On the other hand, a bookkeeper could not be treated both as an employee and an unpaid volunteer bookkeeper for the same institution.

Nuns, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in a preschool operated by their church or religious order are not considered to be employees. However, the fact that such a person is a member of a religious order does not preclude an employee-employer relationship with a State or secular institution.

BASIC MONETARY REQUIREMENTS

Minimum wages: Employees of preschools must be paid at least $2.20 an hour ($2.30 an hour beginning January 1, 1977). Employees in Puerto Rico, the Virgin Islands and American Samoa must be paid the minimum wage established by industry wage orders.

Facilities Furnished to Employees of the preschool: Where meals, lodging, or other facilities are customarily provided for the benefit of the workers, their reasonable cost or fair value is considered as wages paid, under section 3(m) of the Act. This section also provides that such costs shall not be included as part of wages to the extent that they are excluded therefrom by the terms of a bona fide collective bargaining agreement. Reasonable cost is defined in Regulations, Part 531, as the actual cost to the employer without a profit.

The cost of facilities furnished by the employer primarily for the employer's benefit instead of the worker's, may not be included in computing wages. For example, the cost of furnishing and laundering uniforms, where required by the employer or by the nature of the job, may not be charged to the employee where such charge would reduce the wages paid in any workweek below the required minimum wage.

EQUAL PAY PROVISIONS

Under the equal pay provisions of the Act, the employer may not discriminate on the basis of sex by paying employees of one sex at rates lower than those paid employees of the opposite sex in the same establishment for doing equal work on jobs requiring substantially equal skill, effort, and responsibility, and which are performed under similar working conditions. All employees working within an establishment in which employees are subject to the minimum wage provisions of the Act are entitled to the benefits of the equal pay provisions. Also entitled to the benefits of the equal pay provisions are employees employed in bona fide executive, administrative, or professional capacities (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), as defined in 29 CFR Part 541 even though otherwise exempt from the Act's minimum wage and overtime pay provisions.

Exceptions are provided under the Act where it can be shown that a wage differential is based on a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or on any other factor other than sex.

An employer who is paying a wage differential in violations of the equal pay provisions of the Act may not reduce the wage rate of any employee in order to comply with these provisions. Wages withheld in violations of the equal pay provisions have the status of unpaid minimum wages or unpaid overtime compensation under the Act, and back wages due under the equal pay provisions are subject to the same methods of recovery as any other wages due under the Act.

The law prohibits any labor organization, or its agents, representing employees of an employer having employees subject to the minimum wage provisions of the Act, from causing or attempting to cause the employer to discriminate against an employee in violations of the equal pay provisions.

OVERTIME

The Fair Labor Standards Act requires the payment of at least one and one-half times the regular rate of pay to covered, nonexempt employees

after 40 hours of work in a workweek. It does not require that an employee be paid each week. The employer may make the wage or salary payment at other regular intervals, such as every two weeks, every half month, or once a month. What the Act does require is that both minimum wage and overtime pay must be computed on the basis of hours worked each workweek standing alone. The employer cannot average the hours of work over two or more workweeks.

Overtime pay must normally be paid on the pay day for the pay period in which it is worked. Overtime hours may not be accumulated and taken off at any time subsequent to the period in which it is worked.

Before overtime pay can be computed it is necessary to determine the employee's regular rate, since the Act requires payment for overtime hours at not less than one and one-half times the regular rate of pay. The regular rate of pay may not be less than the statutory minimum, and includes all remuneration for employment except certain payments excluded by the law itself.

The regular rate for an employee paid solely on an hourly rate is the employee's hourly rate. One and one-half times this rate must be paid to covered, nonexempt employees after 40 hours of work in a workweek. For an employee who is paid a salary for a specified number of hours a week, the regular rate is obtained by dividing the weekly salary by the specified hours. One-half this rate is due the employee for each hour over 40 up to the specified number of hours, after which time and one-half the regular rate is due. If a salary is paid as straight time pay for whatever number of hours is worked in a workweek, and is large enough to provide pay at or above the minimum wage rate for the longest week worked by the employee, the regular rate is obtained by dividing the salary by the total hours worked each week. One-half this rate is due for all hours worked in excess of 40 in the workweek. If a salary is paid on other than a weekly basis, the weekly pay must ordinarily be determined in order to compute the regular rate and overtime pay. For instance, if the salary is paid for a half month, multiply the salary by 24 and divide the product by 52 to get the weekly equivalent. A monthly salary should be multiplied by 12 and the product divided by 52.

HOURS WORKED

An employee who is subject to the Act in any workweek must be paid in accordance with its provisions for all hours worked in that workweek. In general, hours worked includes all the time an employee is required to be on duty or on the employer's premises or at a prescribed workplace, and all the time during which the employee is suffered or permitted to work for the employer, including any work performed at home by clerical employees.

EXEMPTIONS

Executive, administrative, and professional employees: Employees employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), as defined in Regulations, Part 541, are exempt from the minimum wage and hours provisions of the Act but are covered by the equal pay provisions.

While preschools engage in some educational activities for the children, employees whose primary duty is to care for the physical needs of the children would not ordinarily meet the requirements for exemption as teachers. This is true even though the term "kindergarten" may be applied to the ordinary day care center. However, bona fide teachers in a kindergarten which is part of an elementary school system are still considered exempt under the same conditions as a teacher in an elementary school.

CHILD LABOR PROVISIONS

Sixteen is the basic minimum age for employment in occupations other than nonagricultural occupations declared hazardous by the Secretary of Labor to which an 18 year minimum age applies.

Minors 14 and 15 years of age may be employed in a variety of nonmanufacturing nonhazardous occupations. Such employment must be confined to outside school hours and between the hours of 7 a.m. and 7 p.m. (except from June 1 through Labor Day when the closing hour is 9 p.m.), not more than 3 hours on a school day, 18 hours in a school week, 8 hours on a nonschool day, 40 hours in nonschool weeks.

Where both State and Federal child labor standards apply, the more stringent standard must be observed.

Employers are required to obtain proof of age in accordance with the Secretary's regulation. Any person who violates the child labor provisions or any regulation issued thereunder is subject to a civil penalty not to exceed $1,000 for each violation.

RECORDS

Employers are required to keep records on wages, hours, and other items listed in the recordkeeping regulations (Regulations, Part 516). No particular form of records is required. Time clocks are not required, but all hours worked each workday and the total hours worked each workweek must be recorded in some manner for nonexempt employees. Records of the required information must be preserved for 3 years.

POSTER

The covered preschool must display a Notice to Employees where the employees may readily see it. This poster, which briefly outlines the Act's basic requirements, may be obtained free from the nearest office of the W-H Division.

ENFORCEMENT

Authorized representatives of the W-H Division may investigate and gather data regarding wages, hours, and other conditions and practices of employment. The Act provides these methods of recovering unpaid minimum and/or overtime wages: (1) the Administrator may supervise the payment of back wages; (2) in certain circumstances the Secretary of Labor may bring suit for back pay and an equal amount as liquidated damages; (3) an employee may sue for back wages and an additional sum as liquidated damages plus attorney's fees and court costs; and (4) the Secretary of Labor may also obtain a court injunction restraining violations of the law, including the unlawful withholding of proper minimum wage and overtime pay.

It is a violation of the law to discharge or otherwise discriminate against an employee for filing a complaint or participating in a proceeding under the law.

Willful violations may be prosecuted criminally and the violator fined up to $10,000 on each count. A second conviction for such a violation may result in imprisonment.

A 2-year statute of limitations applies to the recovery of back wages except in the case of willful violations, in which case a 3-year statute of limitations would be applicable.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT

This Act (which is also enforced by the W-H Division) promotes the employment of the older worker based on ability rather than age; prohibits arbitrary age discrimination in employment; and helps employers and employees find ways to meet problems arising from the impact of age on employment. It prohibits arbitrary discrimination in employment, based on age, by employers of 20 or more persons in an industry affecting commerce, employment agencies serving such employers, and labor organizations with 25 or more members in an industry affecting commerce and most employees of Federal, State and local Governments.

Most individuals who are at least 40 but less than 65 years of age are protected from age discrimination in matters of hiring, discharge, compensation, or other terms, conditions, or privileges of employment.

THE FEDERAL WAGE GARNISHMENT LAW

The Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act, also enforced by the Wage and Hour Division) sets restrictions on the amount of an employee's earnings that may be deducted in any one week through garnishment proceedings and on discharge from employment by reason of garnishment. When an employee's disposable earnings---the part remaining after deductions required by law are made---are more than $92 a week, up to 25% of the disposable earnings may be garnished. Where the disposable earnings are $92 or less, only the amount over $69 may be garnished. This law does not change most garnishment procedures established by State law, nor does it annul or affect any provision of a State law that provides greater restrictions on garnishments than under Federal law.

LIST OF PUBLICATIONS

Fair Labor Standards Act
Recordkeeping Regulations, 29 CFR 516
Wage Payments under the FLSA, 29 CFR 531
Executive, Administrative, Professional and Outside Salesman Exemptions, WH Publ. 1363
Overtime Compensation, WH Publ. 1325
Hours Worked, WH Publ. 1344
Equal Pay for Equal Work, 29 CFR 800
Child Labor Bulletin 101
Age Discrimination in Employment 29 CFR 850 and 860
Federal Wage Garnishment Law, WH Publ. 1324

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